SUPREME COURT. U. S.

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JAMES R. BROWNING, Clerk

No. 235

IN THE

Supreme Court of the United States

October Term, 1958

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV, INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., and PLAINS TELEVISION CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR PLAINS TELEVISION CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-2a) is reported at 225 F.2d 191. The Report and Order of the Federal Communications Commission there affirmed is reported in 22 FCC Reports 318 (1957), *sub nom. Television Allocations in Springfield, Ill.-St. Louis, Mo. Areas* (J.A. 183-209).

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958. The petition for certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission, deleting VHF Channel 2 and substituting UHF channels therefor in Springfield, Ill., a predominantly UHF area, encouraged "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)).
2. Only in the event the foregoing question is answered in the negative is petitioner in a position to complain of the reassignment of Channel 2 elsewhere, and to raise the issue whether the reassignment of Channel 2 to St. Louis and Terre Haute contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)).

STATUTE INVOLVED

Section 303(g) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 303(g)), provides:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> . . . .
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .

STATEMENT

In the interest of avoiding needless repetition, respondent Plains Television Corporation adopts the factual

Statement contained in the Brief in Opposition filed herein by respondent American Broadcasting-Paramount Theatres, Inc.

ARGUMENT

I

Proceeding in 1952 on the assumption (then by no means unjustified) that the allocation of VHF and UHF channels to the same markets would compel the manufacture of nothing but all-channel receivers, the Commission in its Sixth Report allocated both UHF and VHF channels in as many markets as possible.[1] But subsequent developments soon demonstrated that in smaller markets to which a single VHF channel was allocated, and in the larger markets where two VHF channels were in use, the 70 UHF channels were becoming "paper allocations" (see J.A. 63-75). Since the 12 VHF channels were inadequate by themselves to provide a nationwide competitive television service (13 RR 1571, para. 12), it was unthinkable that the 70 UHF channels should be allowed to go to waste (see J.A. 82).

Thus confronted with a situation where there were not enough VHF channels to go around, and with UHF channels not being utilized, it took no great acumen in 1956 to conclude, with 82 channels to work with, that the public would receive service from more stations if equally competitive UHF channels were used in areas where UHF was providing a satisfactory service, and if the VHF channels theretofore assigned to those areas (but still tied up in comparative hearings) were shifted to VHF markets where UHF had been unable to obtain a foothold. The Commission so concluded in its Second Deintermixture Report released June 26, 1956 in FCC Docket No. 11532 (13 RR 1571).

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[1] Sixth Report of April 14, 1952, 1 Pike and Fisher, *Radio Regulation* Pt. III, 91:661-665 (hereinafter cited as —— RR ——).

In line with that Report, the Commission instituted proceedings to deintermix Springfield and St. Louis (FCC Docket No. 11747)—by deleting Channel 2 therefrom and substituting UHF channels therefor, and by reassigning Channel 2 to St. Louis, a market obviously destined to become all-VHF (J.A. 1-2). Respondent Plains Television Corporation, the licensee of Station WICS, operating on UHF Channel 20 in Springfield, had long urged such action (J.A. 21), knowing that its UHF station in Springfield and the UHF station in nearby Decatur (Station WTVP) would be in jeopardy the moment Channel 2 went on the air in Springfield (see J.A. 196-197, para. 22). Respondent accordingly supported the Commission's proposal (J.A. 185-186, para. 6), pointing out that if Channel 2 were removed from Springfield it could be used not only in St. Louis but also in Terre Haute (J.A. 21-25; J.A. 185, para. 4).

By findings fully supported by the record, and in no way challenged by petitioner, the Commission found that central Illinois (Springfield-Decatur-Peoria) because of flat terrain was ideally suited for UHF propagation (J.A. 189, para. 10), that numerous UHF stations were operating in that area (J.A. 188-189, para. 8), that the vast preponderance of sets in the area were capable of picking up UHF signals (J.A. 189, para. 9), and that the deletion of Channel 2 would not create any significant "white area" (J.A. 191, para. 13). The Commission further found that by removing Channel 2 from Springfield and substituting UHF channels therefor, and by reassigning Channel 2 to St. Louis and Terre Haute, at least four markets would have additional stations: Springfield would have two or more stations (on UHF) instead of a single station on VHF Channel 2; the nearby city of Decatur (with no VHF channel allocated thereto) would continue to have a station of its own on UHF; St. Louis would have four commercial stations instead of three; and Terre Haute would have a second outlet (J.A. 198-202).

Despite the public interest benefits which would thus stem from deintermixing the Springfield-Decatur portion of central Illinois, petitioner argues that the Commission was foreclosed as a matter of law from taking the action which it did by reason of Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive television system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Springfield, when a VHF station commences operating therein, petitioner says that a VHF channel must be assigned to Springfield by reason of Section 307(b), regardless of the public interest consequences and even though such an allocation results in less service rather than more service (Pet. 13-23).

Neither the Communications Act nor this Court's decisions impose any such "straight jacket" on the Commission. Section 303(g) of the Communications Act places upon the Commission the responsibility of encouraging "the larger and *more effective use* of radio in the public interest" (47 U.S.C. Sec. 303(g)). The Commission found as a fact, amply supported by the record, and not challenged by petitioner here or in the court below (see Pet. 12), that the deletion of the Channel 2 allocation in Springfield would result in more stations and more service in central Illinois (Springfield-Decatur-Peoria) than would its retention in that area (J.A. 198-202). Accordingly, under the express authority contained in Section 303(g) of the Communications Act (47 U.S.C. Sec. 303(g)), the Commission was fully justified in deleting from Springfield the VHF channel which had been allocated to that market in 1952 on an assumption (since disproved) that VHF and UHF stations could exist side by side in the same market. *Second Report on Deintermixture*, 13 RR 1571 (1956). The Commission's action deleting Channel 2 from Springfield was fully warranted, if for no other reason than to improve the number of competitive tele-

vision services in and around Springfield-Decatur and even though the deleted VHF channel had been placed "on ice" without reassigning it elsewhere—as the Commission did in the *Vail Mills* and *Elmira* cases decided at the same time. 22 FCC Reports 293 (1957); 22 FCC Reports 307 (1957).

Petitioner, whose appeal from a decision of the Commission preferring a competing applicant for Channel 2 is still pending in the court below,[1] is aggrieved by the action *deleting* Channel 2 from Springfield, and *not by its reassignment elsewhere*. What use is made of Channel 2, in the event the public interest (as the Commission found) would be better served by its non-utilization in the Springfield-Decatur area, is of no moment to petitioner. Technically speaking, therefore, petitioner is in no position to raise a Section 307(b) question (based on the comparative needs of Springfield and St. Louis and/or Terre Haute), in view of the Commission's finding (not contested) that the non-utilization of Channel 2 in Springfield would result in more service rather than less service in that area (J.A. 198-202).

II

But even assuming *arguendo* that petitioner is in a position to invoke Section 307(b), the action here challenged implements rather than contravenes the Communications Act, including Section 307(b). An intermixed system of channel allocations where the net effect of a single VHF operation is to close down multiple UHF services does not constitute an "*efficient* and equitable distribution of *radio service*" within the meaning of Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). UHF "paper allocations" do not constitute "radio service."

The Commission's authority, by prior rule-making proceedings, to set aside one class of frequencies for "com-

[1] See Pet. p. 7, fn. 10.

munities" of one type and a different class of frequencies for "communities" of another type has long been recognized. See *Huntington Broadcasting Co.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the Commission properly decided in Docket No. 11532 (by its Second Report on Deintermixture) to make greater use of UHF channels in areas where UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service (13 RR 1571). To that end, in the instant proceeding, it first decided to make Springfield-Decatur all-UHF—by deleting Channel 2 in that area (J.A. 192). But rather than allow the channel to go to waste, it was placed in two VHF areas (Terre Haute and St. Louis) which were in need of additional service and where UHF "paper" allocations were not providing "radio service".

In short, by deleting Channel 2 in Springfield (and substituting UHF channels therefor) and by reassigning that channel to both Terre Haute and St. Louis, such action meant that Springfield-Decatur would have three or more commercial stations (instead of one). St. Louis would have four (instead of three), and Terre Haute would have a second station.[1] In thus providing more television service to the public in those areas and more effective competition among all three networks, the Commission's action implemented rather than contravened the requirements of Sections 303(g) and 307(b) of the Act (47 U.S.C.

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[1] Subsequent developments fully supported the wisdom of the Commission's action. As a result of the action here challenged, the programs of all three networks are now available in the St. Louis area. Springfield-Decatur (instead of being limited to one station on VHF Channel 2) has two UHF operations (stations WTVP and WICS); it has channels available (when the instant litigation is concluded) for a third operation. In Terre Haute, where the UHF had gone begging for five years, multiple applications have been filed requesting authority to establish a second service in that market on VHF Channel 2.

Secs. 303(g) and 307(b)). This Court's decisions in the *Nelson Brothers, Allentown,* and *Sanders* cases, on which petitioner relies (Pet. pp. 12, 13, 19, 20, 21-24), dealt with an entirely different problem and are in no way in conflict with the decision below.

CONCLUSION

The Commission's action here challenged was properly affirmed by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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